Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

NO. 76-1186

LEON A. COHEN,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 3, 1977 and January 31, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals below has not yet been officially reported, but a copy of the Court's opinion is appended hereto. There was no reporting of

any opinion rendered by the District Court below.

JURISDICTION

The judgment of the court below (see appendix) was entered on January 3, 1977. The Appellant's timely filed Petition for Rehearing and Petition for Rehearing En Banc was denied by entry of an order dated January 31, 1977. This case involves the appeal from a criminal conviction relating to the statutory provisions of the Internal Revenue Code and jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the first analytical judicial construction of Rule 609(b) of the recently enacted Federal Rules of Evidence, relating to the admissibility of prior convictions for impeachment purposes, should be permitted to establish precedent which would authorize a trial judge to resolve the question of the admissibility of a

"stale" conviction without first balancing the probative value with the prejudicial effect and thereafter determining that the former substantially outweighs the latter.

2. Whether a criminal conviction should be permitted to stand where the defendant was not informed as to the nature and cause of the charges, but where that defendant was, instead, misinformed as to the nature and cause of the charges by the willful and affirmative misrepresentations of Government counsel to both the trial court and to the defendant.

3. Whether a criminal conviction should be permitted to stand where the defendant was convicted upon charges not brought in the indictment by the Grand Jury, but instead brought by Government counsel and the trial court in the middle of trial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States

Constitution.

2. The Sixth Amendment, United States Constitution.

3. Rule 609(b) of the Federal Rules of Evidence, 28 U.S.C., which states in pertinent part, as follows:

> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

4. Rule 7(c)(1) of the Federal Rules of Criminal Procedure, 18 U.S.C., which states, in pertinent part, as follows:

> "(c) Nature and Contents.
>
> (1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

5. The statute under which Petitioner

was convicted, §7206(1), I.R.C., 26 U.S.C. 7206(1), states, in pertinent part, as follows:

> "Any person who--
> (1) Declaration under penalties of perjury.--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

STATEMENT*

The indictment in this case was originally returned in five counts under the style of Criminal Action No. CR74-464A (SR. 4-7), the first four counts alleging

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*Counsel for Petitioner was notified by the Office of the Clerk of this Court that the transcript should not be transmitted at this stage of the proceeding. The Petitioner will make reference to true and correct excerpts from the record and upon request by this Court for all or part of said record, counsel for Petitioner will have same duly transmitted.

federal income tax evasion for the years 1968 and 1969, and the fifth count relating to an alleged false statement and unreported assets on a financial statement which accompanied an offer in compromise.

Approximately one week before the scheduled date for the trial of all five counts of the original indictment, Government counsel filed a motion to consolidate (R.541) in which they moved the Court for an order joining the original indictment with the newly returned indictment styled Criminal No. CR 75-283A (R. 539). The motion to consolidate stated that the new indictment "would supercede Count Five of CR 74-464A." At the hearing on said motion on June 30, 1975, Government counsel, responding to very specific questions by the court (PR. 9), represented to the Court and to defense counsel that the only effect of the change was to eliminate approximately 85% of the alleged assets which the defendant

was charged with failing to report and thus, limit its proof to the $30,000 in Federal Reserve Bank drafts. Based upon this representation and in reliance upon its understanding that the new indictment merely restricted the Government's proof to the $30,000 originally pled (PR. 13, 15, 16, 32), the trial court permitted Count Five to be reindicted and permitted the new indictment (CR 75-283A) to be substituted for Count Five of the original indictment, all of which was done over the objection of defense counsel (PR. 14). The pertinent terminology of Count Five of the original indictment charged defendant with having "stated that he had total assets as of January 30, 1970, having a cost of $12,502 and a fair market value of $1,619.50, whereas he then and there well knew and believed he had certain additional assets as of the aforementioned date of January 30, 1970, to-wit: $30,000.00 in funds comprising a

a part of certain Federal Reserve bank drafts; (and the other listed assets which were deleted from the second indictment)" (SR. 7).

The pertinent terminology of the new indictment (CR 75-283A) charged that defendant "stated that he had total assets having a cost of $12,502 and a fair market value of $1,619.50, whereas as he then and there well knew, he had substantial assets in addition thereto, to-wit: $30,000, consisting of three Federal Reserve bank drafts payable to the order of Leon Cohen" (R. 539). Having relied upon the representation of Government counsel that the only effect of the new indictment was to eliminate the various other assets which defendant was accused of having on January 30, 1970, defendant's attorneys did not notice and did not attach any significance to the fact that the terminology "as of January 30, 1970" had been omitted from the new indictment.

On the morning of July 7, 1975, at the

very time when the trial was scheduled to begin, Government counsel informed the Court and defense counsel that the Government could not prove a case to support the income tax evasion charges alleged in Counts One through Four of the original indictment and consequently, the Government was dismissing with prejudice Counts One through Four (SR. 70). At this point, the entire original indictment had been dismissed and the only thing before the Court was CR 75-283A, which was the new indictment returned approximately one week before the trial.

The trial commenced as scheduled on July 7, 1975, and at the close of the Government's case, the defendant filed a motion for acquittal (R. 606), and argued that the Government had completely failed to prove that defendant had the alleged additional assets on January 30, 1970, when he made the financial statement alleged in the indictment to be false (R. 336, 339, 350).

At that point, the Government for the first time revealed that it considered February 13, 1970, to be the operative date concerning possession of the assets and the statement "I have no assets," contained on the offer in compromise dated February 13, 1970, to be the perjurious statement (R. 342). The Court, first appearing to agree with the defendant's understanding of the charge, expressed his belief that the false statement was supposed to have been made on January 30, 1970 (R. 341, 342), and then stated that in its opinion, the evidence viewed most favorably to the Government did not support the charge that the defendant had the alleged additional assets at the time the statement was made (R. 343, 344). Instead of granting defendant's motion for judgment of acquittal, however, the Court was swayed by the Government's argument that the January 30, 1970, date had been removed from the second indictment and that in any

event, the statement "I have no assets," made by defendant on the February 13, 1970 offer in compromise might be shown to be false under the evidence previously presented (R. 344, 345). Defense counsel immediately directed the Court's attention to the fact that the allegations of the indictment were quite specific and that the re-interpretation of same as made by the Court and prosecutor constituted an entirely different theory than that upon which the trial had theretofore been conducted (R. 345-346). The Court, however, embracing the new date and the new statement, denied defendant's motion (R. 346-347). The defendant, prior to proceeding with his case, expressed his surprise at being called upon to defend the charges as of February 13, 1970, as opposed to the originally charged date of January 30, 1970, and objected to the prosecution's change of theory midway through trial (R. 347; 352).

The defense, already hampered by the

change of theory, was further set back when the Court ruled that the defendant's prior conviction of another offense, although more than ten years old, would be admitted should the defendant take the stand in his own defense (R. 355-361).

At the close of the defendant's case, defense counsel once again moved for a judgment of acquittal, citing the essential facts that the charge specifically made in the indictment had been successfully refuted by the evidence and that the defendant has been unfairly put to the burden of defending a new charge which had not been returned by the Grand Jury and of which the defendant was not notified so as to allow for the preparation of a proper defense (R. 428-432). The Court, although once again expressing his initial misunderstanding of the Government's theory, denied the motion (R. 433).

After deliberating, the jury returned

a verdict of "guilty" (R. 488). Within the allowable time, the defendant filed a motion for judgment of acquittal or, in the alternative, motion for new trial (R. 623-650), and the Government filed a responsive brief (R. 651-657). During the oral presentation of these motions, defense counsel reiterated the same points it had been raising throughout the trial: that the evidence clearly failed to support a conviction on the charge contained within the indictment and that the defendant had been unfairly surprised at being forced to defend charges not contained within the indictment (R. 493-518). The Court, immediately after defendant's argument, expressed its concern over the fact that both it and the defendant had been "surprised" by the unrecognized deletion of the January 30, 1970 date from the second indictment (R. 519). The Court spoke at length of the fact that his allowance of the second indictment a week before trial

was based on his understanding that the effect of the new indictment was only to reduce the assets that the defendant was alleged to have concealed and that his understanding of the charge in the indictment did not contemplate any change in the originally alleged date of January 30, 1970 (R. 518-534). The Court expressed the view that in changing the indictments, the Government had been less than honest with both the Court and the defendant as to the reasons for and desired effects of the change (R. 523, 533). The Court further stated that it, like the defendant, did not fully understand the charge against the defendant until the argument on defendant's motion at the close of the Government's case (R. 533). Finally, the Court expressed the view, long proffered by the defendant, that the evidence failed to establish that the defendant had the three bank drafts in his possession at the time he made his January 30, 1970 financial

statement (R. 562).

While showing obvious concern over the manner in which the Government had proceeded against the defendant, the Court reserved his ruling on the motions (R. 534), but two months later, he denied same without written opinion (R. 658). Thereafter, the defendant filed his notice of appeal (R. 660-661). The Court of Appeals for the Fifth Circuit affirmed this judgment by opinion rendered on January 3, 1977 (see Appendix) and denied the defendant's timely filed Petition for Rehearing and Petition for Rehearing En Banc on January 31, 1977. Within thirty days after the denial of the aforesaid petitions, the defendant-appellant filed the within Writ for Certiorari.

REASONS FOR GRANTING THE WRIT

1. AS TO ISSUE NO. 1 CONCERNING RULE 609(b) OF THE FEDERAL RULES OF EVIDENCE.

This case represents the first judicial construction by a Circuit Court of Appeals

of the very important standard by which the trial court's discretion in determining the admissibility of a more than ten-year-old prior conviction under Rule 609(b) of the Federal Rules of Evidence, enacted six days prior to the trial of the instant case. After lengthy legislative debate, the final version of that statute, as adopted, provides in essence that a criminal defendant cannot be impeached by the existence of a prior conviction which is more than ten years old, "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect . . .". The important question at bar, the resolution of which will act as precedent in countless criminal trials hereafter, is by what standard should the trial court act in determining the admissibility of a "stale" conviction.

Prior to analyzing the Court of Appeals' decision, the Petitioner suggests that a review of the legislative history of Rule 609 is essential. It is significant that the first draft of the Rule submitted by the Advisory Committee appointed by Chief Justice Earl Warren of the Supreme Court of the United States provided for an arbitrary limit of ten years, after which time the evidence of a prior conviction would be conclusively inadmissible. In that regard, the Advisory Committee's Note states:

> "Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized." (See Federal Rules of Evidence, Notes of Advisory Committee on Proposed Rule, 28 U.S.C.A., p. 288).

It is further significant that the Court's proposed rule, when sent to the House of Representatives, was not changed as it related to the arbitrary ten-year limit. As stated in the Report of the

House Committee on the Judiciary:

> "The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible." (See, Notes of Committee on the Judiciary, House Report No. 93-650, Note to Subdivision (b)).

It was not until the proposed rule reached the Senate that the language allowing discretion after a ten-year lapse was added. Regarding that amendment and the scope to be granted same, it is stated in the Report of the Senate Committee on the Judiciary as follows:

> "Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by

> the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect. It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact." (Emphasis supplied). (See, Notes on Committee on the Judiciary, Senate Report No. 93-1277, Note to Subdivision (b)).

As shown above, the early drafters of Rule 609(b) favored an approach which would legislatively recognize intolerance of the use of stale convictions for impeachment purposes. Only the third and final stage of adoption saw fit to allow the trial court to exercise discretion after the ten-year limit and, even then, these older convictions should be admitted "very rarely and only in exceptional circumstances."

Additionally, the Senate's amendment which permitted the trial court to exercise its discretion was added with the requirement that in so doing and prior to admitting said evidence, the trial court must "make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighed its prejudicial impact." (Emphasis supplied).

Turning to the decision under present scrutiny, the Petitioner submits that said opinion condones, adopts and sets forth a standard of admissibility which is clearly insufficient when viewed in light of the legislative intent of said statute. As has been previously stated, the trial court's decision to admit the evidence must be supported by "specific findings on the record as to the particular facts and circumstances it has considered in determining that the

probative value of the conviction substantially outweighs its prejudicial impact." It is axiomatic, submits the Petitioner, that in order to determine the relative weight of two objects, one must consider the weight of each; nevertheless, the Court of Appeals erroneously condoned and adopted a standard in which the trial court merely considers the weight of only the probative value without any regard to the weight of the prejudicial effect. At page 427 of the opinion, the Court of Appeals noted three factors considered by the trial court in determining the admissibility of the conviction, and said "although the trial judge did not explicitly so state, each of these factors goes to the probative value of the prior conviction as impeachment evidence." Having isolated those three factors, the Court of Appeals then turned to the remaining two-thirds of the equation: does that probative value (1) substantially outweigh

(2) the prejudicial effect? Concerning the latter factor, the Court of Appeals noted that the trial court did not "analyze on the record the nature of possible prejudice to defendant." Likewise noting that the trial court did not utilize the term "substantially outweighs," the Court of Appeals nevertheless said the following:

> "Since the court had the Rule before it when it made the determination that the prior criminal activity of the defendant was admissible, the finding of the district court can be interpreted as concluding that the usefulness of this past criminal conviction substantially outweighed the possible prejudice to defendant."

In short, the "specific standard" by which a trial court must exercise his discretion was set forth, for precedential purposes, as follows:

> If a trial court considers any factors which bear upon credibility, the appellate court can look upon same as a finding of probative value. With such a finding, the appellate court can assume that since the trial judge had the Rule before him when he

> determined the prior conviction to be admissible, he must have felt that the factors he considered (converted into probative value by the appellate court) substantially outweighed the possible prejudice to defendant -- this, even though the trial judge made no findings whatsoever as to the quality, nature and extent of prejudice to the defendant and though he made no effort to compare the relative weight of any such prejudice vis-a-vis the factors considered relevant to credibility.

The Petitioner very strenuously urges that the above standard does not comply with the spirit nor letter of Rule 609 in that it permits appellate approval of the admissibility of prior convictions on no more a showing than that said prior conviction has "some" probative value. The Court of Appeals' finding to the effect that, "that the court neither analyzed on the record the nature of possible prejudice to defendant nor used the explicit words of the Rule in terms of 'substantially outweighing' is not crucial," is, the Petitioner

respectfully submits, a misconstruction of the statute. In comparing the relative weights of two factors, it is not only crucial, but it is absolutely essential to know and consider the weight of the second factor as well as that of the first.

The Court of Appeals concluded its opinion concerning the Rule 609 question as follows:

> "While Rule 609(b) may envision a more explicit proceeding with full findings setting forth the quality and nature of any possible prejudice to the defendant, we are satisfied that the district court acted within the confines of the Rule and did not abuse its discretion in admitting the prior conviction."

The Petitioner submits that, as the case of first impression upon which all later judicial construction of Rule 609 will be based, the instant opinion should do more than acknowledge an "envisioned" standard which should, but need not be utilized by a trial court; it should do more than condone an unstated and uncertain

"confines of the Rule" within which a trial judge can be affirmed notwithstanding his failure to utilize the "envisioned" standard; and it should do more than affirm an exercise of discretion when <u>all</u> of the relevant factors necessary to exercise such discretion are neither considered by the trial court nor placed upon the record for review by the appellate court. Instead, this Court should accept the opportunity to convert legislative intent into judicial reality by enunciating a clear and concise rule which calls upon the trial court to consider the facts and circumstances of both the probative value <u>and</u> the prejudicial effect and to place upon the record those facts and circumstances in order that the appellate courts will have some measure by which to determine whether the trial court acted properly in exercising his discretion to the effect that the former "substantially outweighed" the latter. Without such a

standard, the new Rule 609 will be forever emasculated to the point that any prior conviction deemed relevant to credibility will be freely admitted notwithstanding its age - a result unwanted by the Supreme Court's Advisory Committee and the House Committee on the Judiciary and a result unintended by the Senate Committee on the Judiciary.

2. AS TO ISSUE NO. 2 CONCERNING GOVERNMENT COUNSELS' WILLFUL AND AFFIRMATIVE MISREPRESENTATIONS TO THE TRIAL COURT AND TO THE DEFENDANT AS TO THE NATURE AND CAUSE OF THE PROCEEDINGS.

The Sixth Amendment to the Constitution of the United States provides that the accused in a criminal prosecution shall "be informed of the nature and cause of the accusation." In the case at bar, there was a pre-trial substitution of indictments, the effect of which was not understood by either the trial court or the defendant as a result of the willful and affirmative misrepresentations by Government counsel as to the reasons

for and alleged effect of the change. This misunderstanding as to the nature and cause of the substituted indictment resulted in the defendant and the trial court proceeding through the trial on one theory and Government counsel proceeding upon another theory.

Were it not for the requirement of brevity, the Petitioner would quote page after page wherein the trial court went on record in its expression of outrage in the manner in which Government counsel surreptitiously amended the criminal charges on the eve of trial under the misrepresented guise of merely deleting assets when, in fact, the Government intended the change to have a more far-reaching effect than was made known to the trial court or to the defendant. While the opinion of the Court of Appeals states that "there is no indication that there was any secret or surprise involved in the substitution" (see page 426

of opinion), the Petitioner shows that the trial court, in chastising Government counsel, stated the following on the record:

> "I will tell you what disturbs me the most about this thing is the fact they were surprised because frankly I was too." (R. 519) (Emphasis supplied).
>
> . . .
>
> "I consider you were less than straightforward with me about it (the change)." (R. 523).
>
> . . .
>
> "I directed in that conference some very pointed questions to you about the reasons for the change and you never once told me of any reason other than deleting those other allegations concerning the assets.' (R. 527).
>
> . . .
>
> ". . . in response to very pointed questions of mine you did not, to put it in the common vernacular, shoot straight with me. You were less than honest with me and with the defendant, too, because I asked you very pointed questions about what the purpose of the new indictment was for, and based upon those representations I allowed you to go to trial. You could have easily related it at that time, and under the questions directed to you, in my opinion, you were under an obligation as an officer of the Court not to play games with me and to fully disclose why you had reindicted the case. I see now that obviously there was another very valid reason why you did it or that you thought you had another very valid reason and that is what concerns me about the case. I may very well have allowed you to go to trial on it then if you had told me the truth about it. I don't know what I would have done. I will be very frank, I did not understand until the motion for judgment of acquittal was made and you started arguing it at that time, did I fully understand what you had done and why you had changed it." (R. 533). (Emphasis supplied).

Indeed, even Government counsel conceded that it had not made the alleged effect of the change known either to the trial court or to the defendant. Responding to the trial court's charges as partially quoted above, trial counsel for the Government said:

> "Your Honor, I have to apologize. I thought that I had (made the change clear) and I thought it was understood. If I didn't--and I obviously didn't--I apologize." (R. 527) (Emphasis supplied).

The Petitioner shows that this Court should grant the instant writ in that the

the appellate court sanctioned a departure from the constitutional requirements of notifying the defendant of the nature and cause of the charges against him. In granting and resolving said writ, this Court should judicially declare intolerance to convictions obtained where Government counsel makes affirmative misrepresentations to both the trial court and the defendant; where Government counsel is "less than straight-forward" with the court (R. 523); where Government counsel "did not . . . shoot straight" with the court (R. 533); where Government counsel is "less than honest with (the court) and with the defendant, too" (R. 533); where under pointed questions from the trial court, Government counsel "play(ed) games" with the court (R. 533); and where, in reference to the reasons for changing the indictment, Government counsel had not "told the truth about it" (R. 533).

3. AS TO ISSUE NO. 3 CONCERNING THE VARIANCE BETWEEN THE CRIME CHARGED AND THE ALLEGED CRIME USED IN OBTAINING THE CONVICTION.

The Fifth Amendment to the United States Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .". The Sixth Amendment provides that the accused shall "be informed of the nature and cause of the accusation. . .". Finally, Rule 7(c)(1) of the Federal Rules of Criminal Procedure, 18 U.S.C. provides that, "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Initially, it must be noted that 26 U.S.C.A. §7206(1) is a perjury statute. As was stated in Kolaski v. United States, 362 F.2d 847 (5th Cir. 1966):

"The statute hereinvolved is a

perjury statute. As in the general statute on perjury, 18 U.S.C.A. §1621, the gist of the offense is a false statement."

Concerning the false statement which comprises the "gist of the offense," the Fifth Circuit Court of Appeals stated in Hillard v. United States, 24 F.2d 99 (5th Cir. 1928), that:

> "It is essential, in charging perjury, that the indictment shall clearly set out wherein the witness has sworn falsely." 24 F.2d at 100.

The "variance" of which the Petitioner complains is that the Grand Jury's indictment clearly set out wherein it contended the defendant had sworn falsely, but the trial court and the appellate court, being unable to find the falsity of that statement, affirmed the conviction on the grounds that another statement was false. The amended indictment, as essentially set forth at page 425 of the appellate court's decision, charged that the Petitioner made a false statement when he stated that "he had

total assets having a cost of $12,502 and a fair market value of $1,619.50, whereas he then and there well knew, he had substantial assets in addition thereto, to-wit: $30,000 consisting of three Federal Reserve Bank drafts. . .". Since "the truth or falsity of the statement is to be related to the time the statement is made," Kolaski v. United States, supra; since the statement alleged in the indictment to be false was made "as of January 30, 1970" (Government's Exhibit 1); and since it was shown at trial that the statement was not false when made (R. 343-344; 526), the Petitioner asserts that he was entitled to a judgment of acquittal. The appellate court, however, affirmed the conviction on the basis that the defendant swore falsely when he certified on February 13, 1970 (by filing the offer in compromise on that date), that the various documents were "true, correct and complete" (see p. 426). Accordingly, the Petitioner

respectfully shows that one statement was alleged to be false, while another (separate and different) statement was relied upon to support the conviction.

Concerning the question of "variances" in false statement cases, the Fifth Circuit Court of Appeals, sitting en banc, recently said:

> "The extent or range by which proof may vary from the indictment before prejudice arises is much narrower in a false statement case than in many other prosecutions." United States v. Lambert, 501 F.2d 943, 948 (5th Cir. 1974).

While the perjury statute involved in Lambert was not 26 U.S.C.A. 7206(1), the court there dealt with the inherent difficulties in defending any false statement case where the indictment fails to inform the defendant of the specific statement which he is alleged to have falsified. At page 858, the court in Lambert said:

> "In the false statement case the inquiry is threefold: Did the

> defendant say what the indictment charges him with saying? If he did, does it depart from the truth? Was it material? The starting point for everything is the statement. Once the defendant is informed what it is he is claimed to have said, then he can marshal his evidence tending to show that he did not make the utterance charged, or that it is true, or that it was not material. If the threshold information given is not correct, the defendant is hampered in defending on all three grounds, since the starting point for the latter two is the content of his alleged statement." (Emphasis supplied).

At page 949, the Lambert court said:

> "The mere fact that jurors might reasonably agree with the recharacterization of the actual statement does not cure the prejudicial impact upon the defendant of an indictment which, as it turns out, did not sufficiently apprise him of what evidence he must marshal and present."

The Court of Appeals, it is respectfully submitted, erred in its conclusion that "the Government proved precisely what was alleged when it demonstrated that on February 13, 1970, Cohen then and there

well knew that he had $30,000 in Federal Reserve checks which he failed to disclose," (see p. 420), in view of the fact that said conclusion focuses only upon what the Court considered to be the true statement without recognition of what it considered to be the allegedly false statement. As was stated previously, "the gist of the offense is a false statement," Kolaski v. United States, supra, and in charging and proving a case of false statement, the Government must inform the defendant of precisely that allegedly false statement upon which he is to be tried. As shown by the Lambert decision at page 947, in prosecuting the violation of 26 U.S.C.A. 7206(1), the Government is bound to prove the elements of the offense by those specific facts charged in the indictment:

> "If an indictment alleged particular facts as constituting an element of a charged crime, there is a variance if the trial judge admits evidence that makes out the

element in a different manner."

Likewise, as was stated in United States v. Davis, 461 F.2d 83 (5th Cir. 1972):

> "Since the Government chose to charge a section 1708 violation in a particular manner, we hold that in any conviction pursuant to the indictment, the prosecution is bound by the particular allegations contained therein and it cannot obtain a conviction by proof of a violation of the same statute in a manner not alleged."

In the present case, the Grand Jury charged the defendant with making one false statement, and the trial court, prosecutor, trial jury and appellate court convicted him of making another. The statement charged was made on January 30, 1970; the statement upon which the conviction and appellate decision rested was made on February 13, 1970. Each statement was made under separate oath of perjury, each being on a different document and each made under different circumstances and in response to different inquiries. The Grand Jury had both statements

before it when the indictment was drawn, but significantly, it chose to allege the falsity of one, but not the other. The defendant in the instant case marshalled his evidence, prepared his defense and showed at trial that the statement alleged in the indictment to be false, was in fact true. He respectfully submits that in affirming the conviction based upon the alleged false statement to the effect that the forms were "true, correct, and complete," the Court of Appeals erroneously disregarded and ruled in contravention of the Fifth and Sixth Amendments to the Constitution of the United States. The Petitioner respectfully requests this Court to grant the instant writ and declare that a criminal defendant should be informed of the charges upon which he is to be tried and that he should be tried upon the charges about which he was informed.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

JONES & BARNWELL

BY: Taylor W Jones
TAYLOR W. JONES

BY: Charles F. Barnwell
CHARLES F. BARNWELL

Attorneys for Petitioner

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit in the case of:

United States of America,
Plaintiff-Appellee,

v.

Leon A. Cohen, Defendant-Appellant.

No. 75-3966

UNITED STATES of America, Plaintiff-Appellee,

v.

Leon A. COHEN, Defendant-Appellant.

No. 75-3966.

United States Court of Appeals, Fifth Circuit.

Jan. 3, 1977.

By a judgment of United States District Court for the Northern District of Georgia, at Atlanta, William C. O'Kelley, J,, the defendant was convicted of filing with Internal Revenue Service an offer in compromise of tax liability containing materially false statements and he appealed. The Court of Appeals, Roney, Circuit Judge, held, inter alia, that there was no variance between the facts proved relating to defendant's failure to disclose possession of $30,000 in checks at time of offer and indictment charging the submission of an offer containing materially false statements, that defendant suffered no prejudice from substitution of indictment, that trial judge did not abuse his discretion in allowing a more than ten-year-old mail fraud conviction to be admitted for purpose of impeachment, and that trial court did not abuse discretion in admitting as relevant a five-year-old letter bearing on defendant's state of mind with respect to discharge of tax liability.

Affirmed.

1. Internal Revenue ⇐2408

Where the taxpayer was in possession of $30,000 in checks payable to himself on date of offer in compromise of tax liability and did not disclose his possession of those checks on offer in compromise form, failure to indicate possession of those checks as of date of compromise offer of February 13th was a material omission, notwithstanding claim that the accompanying statement of financial condition was as of January 30, while the checks were dated February 5. 26 U.S.C.A. (I.R.C.1954) § 7206(1); Fed. Rules Crim.Proc. rule 48, 18 U.S.C.A.

2. Internal Revenue ⇐2408

Omission of a material fact in an offer to compromise tax liability renders such statement just as much not true and correct within meaning of statute as the inclusion of a materially false fact. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

3. Internal Revenue ⇐2446

There was no fatal variance between indictment charging defendant taxpayer with submitting an offer in compromise of tax liability containing materially false statements and proof showing that defendant failed to disclose his possession of $30,000 in checks on the date of the offer in compromise. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

4. Criminal Law ⇐1032(2)

Since same offense was charged in both the original and substituted indictments, question of permitting dismissal of original indictment and the related substitution was, in first instance, for trial court. Fed.Rules Crim.Proc. rule 48, 18 U.S.C.A.

5. Criminal Law ⇐1167(1)

Since various forms filed by taxpayer in connection with offer to compromise tax liability were all part of one continuous course of dealing and original indictment respecting the making of an offer in compromise containing materially false statements referred to dates of February 13 and January 30, substitu-

tion in operative date of perjury count from January 30 to February 13 was not prejudicial to defendant who was told that substitute indictment had clarifying language with respect to date of offense and did not request a continuance or opportunity to recall any government witnesses when he allegedly learned import of date. 26 U.S.C.A. (I.R.C.1954) § 7206(1); Fed.Rules Crim.Proc. rule 48, 18 U.S.C.A.

6. Courts ⇐85(3)

Since there was no showing that application of rules would not be feasible or work an injustice, Federal Rules of Evidence, which became effective six days prior to commencement of trial for filing an offer in compromise of tax liability containing materially false statements, were applicable. 26 U.S.C.A. (I.R.C.1954) § 7206(1); Federal Rules of Evidence, rule 609, 28 U.S.C.A.

7. Criminal Law ⇐1153(1)

On questions involving impeachment of witness, determination of district court is to be tested on review by abuse of discretion standard.

8. Criminal Law ⇐369.1

Assumption that prior conviction demonstrates propensity on part of defendant to have acted on present occasion in conformity with criminal character suggested by previous conviction is impermissible. Federal Rules of Evidence, rule 404(b), 28 U.S.C.A.

9. Witnesses ⇐337(6)

Where sufficient evidence in record of prosecution for filing an offer in compromise of tax liability containing materially false statements indicated that trial judge thoroughly analyzed issue of whether a more than ten-year-old mail fraud conviction could be used to impeach defendant if he took stand and concluded that evidence of such prior conviction could be introduced on various factors, failure of trial court to analyze on record the nature of possible prejudice to defendant was not crucial and trial court did not abuse discretion in admitting prior conviction. 26 U.S.C.A. (I.R.C.1954) § 7206(1); Federal Rules of Evidence, rules 609, 609(b), 28 U.S.C.A.

10. Criminal Law ⇐1153(1)

Determination of relevancy is for trial judge and will not be disturbed in absence of clear showing of abuse of discretion.

11. Internal Revenue ⇐2448

Since there was ample indication that five-year-old letter did bear on defendant's state of mind, vis-a-vis the matter of discharging past tax liability, district court did not err in determining that letter was relevant and admissible in prosecution for submitting an offer in compromise of tax liability containing materially false statement. 26 U.S.C.A. (I.R.C.1954) § 7206(1).

Appeal from the United States District Court for the Northern District of Georgia.

Before AINSWORTH and RONEY, Circuit Judges, and ALLGOOD, District Judge.

RONEY, Circuit Judge:

Defendant Leon A. Cohen appeals his conviction for filing with the Internal Revenue Service a Department of the Treasury Form 656, entitled "Offer in Compromise," containing materially false statements, in violation of 26 U.S.C.A. § 7206(1). Defendant asserts four errors on this appeal: (1) that there was a fatal variance between the proof offered and the offense alleged in the indictment and that the evidence was insufficient to

show that his statements as to his assets were false; (2) that a last minute substitution of indictments worked an unfair deprivation of his right to be informed of the charges against him; (3) that the district court abused its discretion in ruling that a thirteen-year-old mail fraud conviction would be admissible to impeach the defendant if he chose to testify; and (4) that a five-year-old letter received in evidence was irrelevant and should have been excluded. Finding these claims without merit, we affirm.

On February 13, 1970, Cohen, who was over $150,000 delinquent in federal income tax payments, completed an Offer in Compromise form for submission to the Internal Revenue Service. He signed that document under a declaration stating that "I have examined this offer, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete." With that document he also filed a Statement of Financial Condition, which stated it was "as of" January 30, 1970. Neither document listed as assets three checks dated February 5, 1970 and payable to Cohen, in a total amount of $30,000. Defendant stated on the Offer in Compromise "I have no assets."

In September of 1974, a five-count indictment was returned against the defendant. The first four counts charged perjury in connection with false statements made on various income tax returns. The fifth count charged perjury in connection with the omission from the Offer in Compromise of various assets supposedly in defendant's possession. Approximately a week and a half before trial commenced, the Government, with the district court's permission, substituted a new count five, alleging solely the omission of the $30,000 in checks from the Offer in Compromise. Before the trial actually began, the Government then dismissed the four counts pertaining to false income tax returns. Defendant was tried and convicted solely for omitting the three checks worth $30,000 from the Offer in Compromise.

Variance Between Indictment and Proof

The indictment on which Cohen was tried alleged that:

> [O]n or about the 13th day of February, 1970 . . . Leon A. Cohen . . . did wilfully and knowingly make and subscribe a Department of the Treasury Form 656 entitled 'Offer in Compromise,' . . . together with an attached and accompanying Department of the Treasury Form 433, entitled 'Statement of Financial Condition and Other Information,' . . . [which] said 'Officer in Compromise' and attachments thereto stated that he had total assets having a cost of $12,502 and a fair market value of $1,619.50, whereas, as he then and there well knew, he had substantial assets in addition thereto, to wit: $30,000 consisting of three Federal Reserve Bank drafts . . . .

The defendant alleges that the only document which definitely sets forth his assets is the Statement of Financial Condition, which was "as of" January 30, 1970. The defendant's position is that the checks dated February 5, 1970, were properly excludable from that document, and that when he certified on February 13, 1970 that the accompanying statement of Financial Condition was "true, correct and complete," he was merely certifying that it reflected his financial position as of the 30th of January, which he maintains it did.

[1-3] The uncontested facts show that on February 13, 1970, the date of

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the Offer in Compromise, the defendant was in possession of $30,000 in checks. Defendant did not disclose his possession of those checks on the Offer in Compromise form. This failure to indicate possession of those checks as of the date of the compromise offer was a material omission, making the form something other than "true, correct and complete." The Government proved precisely what was alleged when it demonstrated that on February 13, 1970, Cohen "then and there well knew" that he had $30,000 in Federal Reserve checks, which he failed to disclose. The omission of a material fact renders such a statement just as much not "true and correct" within the meaning of 26 U.S.C.A. § 7206(1), as the inclusion of a materially false fact. *See United States v. Jernigan*, 411 F.2d 471 (5th Cir.), *cert. denied*, 396 U.S. 927, 90 S.Ct. 262, 24 L.Ed.2d 225 (1969); *Siravo v. United States*, 377 F.2d 469 (1st Cir. 1967). Thus there is no force to the contention that there was a variance between facts proved and the crime alleged, and the evidence was sufficient to support the conviction.

Substitution of Indictments

The defendant contends that he was misled as to the nature of the charges against him because of the last minute change in the wording of the indictment, and that therefore he should be afforded a new trial. The defendant particularly protests what he conceives to be the change in the operative date of the perjury count from January 30, 1970 to February 13, 1970.

[4, 5] Since the same offense was charged in both the original and substituted indictments, the question of permitting the dismissal of the original indictment and the related substitution was, in the first instance, for the trial court. *See* F.R.Crim.P. 48; *United States v. Perkins*, 383 F.Supp. 922, 931 (N.D.Ohio 1974). Since the various forms filed by the defendant were all part of one continuous course of dealing with the Internal Revenue Service, and since the original indictment made reference to the date of February 13, 1970, as well as January 30, 1970, the district court's determination that the substitution was not prejudicial was not in error. *United States v. Arradondo*, 483 F.2d 980, 983 (8th Cir. 1973), *cert. denied*, 415 U.S. 924, 94 S.Ct. 1428, 39 L.Ed.2d 480 (1974).

Furthermore, when the substitution was requested by the Government, the accompanying motion explicitly stated "[t]he new indictment also contains some clarifying language with respect to the date of the offense." The new indictment was read aloud in open court to the defendant. At the close of the Government's case, when the defendant claimed he learned of the true import of the change, he did not request a continuance or the opportunity to recall and reexamine any of the Government witnesses. There is no indication that there was any secret or surprise involved in the substitution. Given these factors, there was no prejudice to the defendant resulting from the change in indictments which would warrant a new trial.

Admissibility of Prior Conviction

[6] The trial of this case commenced six days after the new Federal Rules of Evidence became effective. Because there was no showing by either party that the "application of the rules would not be feasible, or would work injustice," the rules were applicable to the proceedings below. *See* Rules of Evidence, Pub. L.No. 93–595, § 1, 88 Stat. 1926 (1975).

Rule 609 provides that a prior conviction cannot be admitted without special court determination of probative value, if more than ten years have elapsed since the date of conviction or release, whichever is the later date. The Rule provides:

> (a) *General Rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment.
>
> (b) *Time Limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. . . .

In the instant case, the government notified the defendant that, should he choose to testify, it intended to use a previous conviction for the crime of mail fraud to impeach him during cross-examination. That conviction was the result of a guilty plea by the defendant in connection with the very same activities which gave rise to the tax liability which he was trying to settle through his Offer in Compromise. Defendant had been sentenced to three years imprisonment for the crime of mail fraud, and had served from April 10, 1961 until May 15, 1962. Since the trial commenced in July of 1975, the time elapsed from the date of release was just under 13 years, 2 months. Nonetheless, the trial court ruled that this conviction would be admissible to impeach the defendant if he testified, thus invoking the provisions of Rule 609(b).

[7] Since the effective date of the Rules, this Court has not had occasion to consider the type of determination a district court must make under Rule 609(b) to admit into evidence a conviction over ten years old. On questions involving the impeachment of a witness, the determination of the district court is to be tested on review by the abuse of discretion standard. *Goddard v. United States*, 131 F.2d 220 (5th Cir. 1942); *United States v. Allison*, 414 F.2d 407 (9th Cir.), *cert. denied*, 396 U.S. 968, 90 S.Ct. 449, 24 L.Ed.2d 433 (1969); S.Rep.No. 1277, 93d Cong., 2d Sess., Rule 609(b) (1974). Under Rule 609, discretion must be exercised by a specific standard. The Rule requires a finding on specific facts and circumstances that prejudicial effect will be outweighed by probative value.

In evaluating the admissibility of the conviction the district court noted the nature of the prior crime, the similarity between the offense for which he was presently being tried and the offense for which he previously entered a guilty plea, and that both the events to be testified to by the defendant and the acts which constituted the crime he was currently alleged to have committed occurred within ten years of his release from confinement for the earlier crime.

Although the trial judge did not explicitly so state, each of these factors goes to the probative value of the prior conviction as impeachment evidence. That the nature of the crime was one involving dishonesty indicates that defendant might be the type of person who would not take the judicial oath serious-

ly. That the offenses were similar suggests that his denials of current misconduct might not be as trustworthy as they normally would in the absence of previous misconduct of the same kind. Because defendant would be recounting events and acts relevant to the crime of perjury that transpired during a period within ten years after his release from confinement for mail fraud, the jury might believe that his version of those events was colored by his still recent dishonest conduct and was thus less than truthful.

In *United States v. San Martin*, 505 F.2d 918, 923 (5th Cir. 1974), this Court observed that "prior crimes involving deliberate and carefully premeditated intent—such as fraud and forgery—are far more likely to have probative value with respect to later acts than prior crimes involving a quickly and spontaneously formed intent." Similarly such crimes are more probative on the issue of propensity to lie under oath than more violent crimes which do not involve dishonesty. *See* Ladd, *Credibility Trends*, 89 U.Pa.L.Rev. 166 (1940). Since mail fraud is within this category of offenses, its probative value is enhanced.

[8] Of course, the assumption that a prior conviction demonstrates a propensity on the part of the defendant to have acted on the present occasion in conformity with the criminal character suggested by the previous conviction is impermissible. *See* Fed.R.Evid. 404(b). This is because our system of criminal justice focuses solely on the commission of specific forbidden acts, rather than the punishment of those persons who have a criminal or evil character. Unfortunately the trial court seemed to engage, at least partially, in this improper assumption, while otherwise property focusing on the likelihood that the previous conviction indicated a probable lack of veracity. Nonetheless, in reviewing the factors relied on by the district court, it is apparent that they all were relevant to the impeachment inquiry. Having isolated these factors, the district judge then found on the record that they formed "a basis for an exception and that justice would not be counterbalanced against the defendant."

[9] The provisions of Rule 609 require that the court find that probative value "substantially outweigh" prejudicial effect. Since the court had the Rule before it when it made the determination that the prior criminal activity of the defendant was admissible, the finding of the district court can be interpreted as concluding that the usefulness of this past criminal conviction substantially outweighed the possible prejudice to defendant. That the court neither analyzed on the record the nature of possible prejudice to defendant nor used the explicit words of the Rule in terms of "substantially outweighing" is not crucial. Sufficient evidence in the record indicates that the trial judge made a thorough and thoughtful analysis of the issue and based his conclusion upon various factors which were then before him. While Rule 609(b) may envision a more explicit proceeding with full findings setting forth the quality and nature of any possible prejudice to the defendant, we are satisfied that the district court acted within the confines of the Rule and did not abuse its discretion in admitting the prior conviction.

Admissibility of a Five-Year-Old Letter

[10, 11] Defendant's final contention concerns the admissibility of a five-year-old letter which the Government offered in evidence to prove defendant's willfulness. Because of the age of the letter

the defendant claimed it was irrelevant and inadmissible. The determination of relevancy is for the trial judge, and will not be disturbed in the absence of a clear showing of abuse of discretion. *United States v. 110 Bars of Silver*, 508 F.2d 799 (5th Cir. 1975); *United States v. Watts*, 505 F.2d 951 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 1032, 95 S.Ct. 2648, 45 L.Ed.2d 688 (1975). Since there was ample indication that the letter did in fact bear on defendant's state of mind, vis-a-vis the matter of discharging his past tax liability, the district court did not err in determining that the letter was relevant and admissible in evidence.

AFFIRMED.

CERTIFICATE OF SERVICE

I, Charles F. Barnwell, hereby certify that I have this day served counsel for the United States of America with three (3) copies of the foregoing "Petition for a Writ of Certiorari," by depositing said copies in the United States Mail in an envelope with airmail postage prepaid thereon, addressed to:

Solicitor General
Department of Justice
Washington, D. C. 20530.

This 25th day of February, 1977.

Charles F. Barnwell
Charles F. Barnwell
Attorney for Petitioner